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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 APRIL D. KNUTH,)
7 Plaintiff,) No. CV-08-3059-CI
8 v.) ORDER DENYING PLAINTIFF'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,) AND GRANTING DEFENDANT'S
11 Defendant.) MOTION FOR SUMMARY JUDGMENT

13 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct.
14 Rec. 23, 28.) Attorney D. James Tree represents April Knuth
15 (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf
16 represents the Commissioner of Social Security (Defendant). The
17 parties have consented to proceed before a magistrate judge. (Ct.
18 Rec. 7.) After reviewing the administrative record and briefs filed
19 by the parties, the court **DENIES** Plaintiff's Motion for Summary
20 Judgment, and directs entry of judgment for Defendant.

JURISDICTION

22 Plaintiff protectively filed for Supplemental Security Income
23 (SSI) on July 29, 2004. (Tr. 97-103.) She alleged disability due
24 to pinched nerve in back, neck and hips, and a learning disability,
25 with an alleged onset date of March 12, 2002. (Tr. 104-05.) At the
26 hearing, the ALJ also identified the following alleged impairments:
27 diabetes; borderline intellectual functioning; obesity; cervical
28 spine degenerative disc disease (DDD); lumbar spine DDD; and anxiety

1 disorder versus post-traumatic stress disorder (PTSD). (Tr 303-04.)
2 Her claim was denied initially and on reconsideration. Plaintiff
3 requested a hearing before an administrative law judge (ALJ), which
4 was held on February 21, 2008, before ALJ Dan R. Hyatt. (Tr. 299-
5 322.) Plaintiff, who was represented by counsel, and vocational
6 expert Jenipher Gaffney (VE) testified. The ALJ denied benefits on
7 March 17, 2008, and the Appeals Council denied review. (Tr. 13-21,
8 4-6.) The instant matter is before this court pursuant to 42 U.S.C.
9 § 405(g).

10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript
12 of proceedings, and are briefly summarized here. At the time of the
13 hearing, Plaintiff was 39 years old. She had a ninth grade
14 education in special education, but did not finish high school or
15 complete her high school equivalency tests. (Tr. 304.) Plaintiff
16 was married and had no children. (Tr. 305.) Plaintiff reported she
17 tested herself twice daily for diabetes for which she takes
18 medication. (Tr. 305-06.) She had past work experience as a child
19 care attendant, a machine packager, nurse's aide, sandwich
20 maker/fast food worker, and furniture assembler. (Tr. 308-12, 316-
21 17.) She stated she was let go from most of her jobs for lack of
22 attendance or performance issues. (Tr. 311-312.) She testified she
23 could no longer work due to pain in her back and legs. (Tr. 313.)

24 **ADMINISTRATIVE DECISION**

25 At step one, ALJ Hyatt found Plaintiff had not engaged in
26 substantial gainful activity since the alleged onset date. (Tr.
27 15.) At step two, he found Plaintiff had severe impairments of
28

1 "borderline intellectual functioning, obesity, [and] degenerative
2 disc disease of the lumbar spine." (*Id.*) He found non-severe
3 impairments of diabetes, degenerative disc disease of the cervical
4 spine, and "anxiety disorder versus posttraumatic stress disorder."
5 (*Id.*) The ALJ determined at step three the impairments, alone and
6 in combination, did not meet or medically equal one of the listed
7 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
8 (Listings). (*Id.*) He found Plaintiff's statements regarding her
9 symptoms and limitations were "not credible to the extent they are
10 inconsistent with the residual functional capacity assessment."
11 (Tr. 17.) At step four, he determined Plaintiff had the residual
12 functional capacity (RFC) to lift 10 pounds frequently and 25 pounds
13 occasionally; stand and walk four hours in an eight-hour day; and
14 sit for six hours in an eight-hour day, requiring an option to sit
15 or stand at will. She was also "limited to simple, repetitive tasks
16 with no contact with the public." (Tr. 16.) Based on this RFC and
17 VE testimony, the ALJ found Plaintiff was unable to perform her past
18 relevant work. (Tr. 19.) Proceeding to step five, ALJ Hyatt
19 determined Plaintiff was able to perform other jobs that existed in
20 significant numbers in the national economy, such as office helper,
21 small products assembler and marker/pricer. (Tr. 20.) He concluded
22 Plaintiff was not under a "disability" as defined by the Social
23 Security Act at any time through the date of his decision. (Tr.
24 21.)

25 **STANDARD OF REVIEW**

26 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
27 court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a

1 disability, an ALJ must apply a five-step sequential
 2 inquiry addressing both components of the definition,
 3 until a question is answered affirmatively or negatively
 4 in such a way that an ultimate determination can be made.
 5 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 6 claimant bears the burden of proving that [s]he is
 7 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 8 1999). This requires the presentation of "complete and
 9 detailed objective medical reports of h[is] condition from
 10 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 11 404.1512(a)-(b), 404.1513(d)).

1 It is the role of the trier of fact, not this court, to resolve
 2 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 3 supports more than one rational interpretation, the court may not
 4 substitute its judgment for that of the Commissioner. *Tackett*, 180
 5 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 6 Nevertheless, a decision supported by substantial evidence will
 7 still be set aside if the proper legal standards were not applied in
 8 weighing the evidence and making the decision. *Brawner v. Secretary*
 9 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
 10 there is substantial evidence to support the administrative
 11 findings, or if there is conflicting evidence that will support a
 12 finding of either disability or non-disability, the finding of the
 13 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 14 1230 (9th Cir. 1987).

21 **ISSUES**

2 The question is whether the ALJ's decision is supported by
 3 substantial evidence and free of legal error. Plaintiff argues the
 4 ALJ erred when he: (1) rejected her cervical spine DDD and mental
 5 impairments as "frivolous" at step two; (2) improperly rejected the
 6 opinions of medical sources; (3) improperly rejected her testimony;
 7 and (4) failed to meet the Commissioner's burden at step five. (Ct.
 8

1 Rec. 24 at 10-11.)

2 DISCUSSION

3 A. Credibility

4 Plaintiff argues the ALJ did not provide the requisite "clear
 5 and convincing" reasons for rejecting her subjective complaints.
 6 (Ct. Rec. 24 at 19; Ct. Rec. 30 at 7.) When the ALJ finds a
 7 claimant's statements as to the severity of impairments, pain and
 8 limitations are not credible, the ALJ must make a credibility
 9 determination with findings sufficiently specific to permit the
 10 court to conclude the ALJ did not arbitrarily discredit claimant's
 11 allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
 12 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en
 13 banc). It is well-settled, however, that an ALJ cannot be required
 14 to believe every allegation of disabling pain, even when medical
 15 evidence exists that a claimant's condition may produce pain. "Many
 16 medical conditions produce pain not severe enough to preclude
 17 gainful employment." *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
 18 1989). Although an adjudicator may not reject a claimant's extreme
 19 symptom complaints solely on a lack of objective medical evidence,
 20 medical evidence is a relevant factor to consider. *Social Security*
 21 *Ruling (SSR)* 96-7p.

22 If there is no affirmative evidence that the claimant is
 23 malingering, the ALJ must provide "clear and convincing" reasons for
 24 rejecting the claimant's allegations regarding the severity of
 25 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The
 26 ALJ engages in a two-step analysis in deciding whether to admit a
 27 claimant's subjective symptom testimony. *Lingenfelter v. Astrue*,
 28

1 504 F.3d 1028, 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d
2 1273, 1281 (9th Cir. 1996). Under the first step, the ALJ must find
3 the claimant has produced objective medical evidence of an
4 underlying "impairment," and that the impairment, or combination of
5 impairments, could reasonably be expected to cause "some degree of
6 the symptom." *Lingenfelter*, 504 F.3d at 1036. Once the first test
7 is met, the ALJ must evaluate the credibility of the claimant and
8 make specific findings supported by "clear and convincing" reasons.
9 *Id.* In addition to ordinary techniques of credibility evaluation,
10 the ALJ may consider the following factors when weighing the
11 claimant's credibility: the claimant's reputation for truthfulness;
12 inconsistencies either in her allegations of limitations or between
13 her statements and conduct; daily activities and work record; and
14 testimony from physicians and third parties concerning the nature,
15 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
16 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d at 597
17 n.5.

18 The ALJ may also consider an unexplained failure to follow
19 treatment recommendations and testimony by the claimant "that
20 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,
21 1039 (9th Cir. 2008). As explained by the Commissioner in his policy
22 ruling, the ALJ need not totally reject a claimant's statements; he
23 may find the claimant's statements about pain to be credible to a
24 certain degree, but discount statements based on his interpretation
25 of evidence in the record as a whole. *SSR 96-7p*. "For example, an
26 adjudicator may find credible an individual's statement as to the
27 extent of the functional limitations or restrictions due to
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1 symptoms; i.e., that the individual's abilities to lift and carry
2 are compromised, but not to the degree alleged." *Id.* If the ALJ's
3 credibility finding is supported by substantial evidence in the
4 record, "the court may not engage in second-guessing." *Thomas*, 278
5 F.3d at 959; *Fair*, 885 F.2d at 604 ("credibility determinations are
6 the province of the ALJ").

7 Here, there is no evidence of malingering. In explaining his
8 basis for the RFC determination, the ALJ summarized Plaintiff's
9 testimony, specifically noting her testimony that she took
10 medication for her diabetes only, took care of the household chores,
11 had trouble bending, and weighed 269 pounds. He also referenced
12 her testimony that fatigue and back and leg pain prevented her from
13 sitting or standing for a long time or lifting heavy things, and
14 that pain and fatigue affected her energy level and her ability to
15 sleep at night and concentrate. (Tr. 17, 313.) The ALJ then found
16 that Plaintiff's medically determinable impairments could reasonably
17 be expected to cause these symptoms and gave specific reasons for
18 discounting the severity alleged. (Tr. 17.)

19 First, he found Plaintiff's statements were not consistent with
20 the daily activities she described in her testimony and in the
21 records, i.e., taking care of household chores, doing laundry with
22 her spouse's help when bending is necessary, being a primary care-
23 giver for her father until his death in December 2004, cooking,
24 exercising and swimming. *Id.* Inconsistency with activities of
25 daily living is a "clear and convincing" reason to discount
26 Plaintiff's testimony, and the ALJ properly gave specific examples
27 to support his findings. Next, the ALJ found that Plaintiff's
28 allegations of debilitating symptoms were not consistent with her

1 treatment record. Plaintiff appears to argue her treatment history
2 is not a legitimate reason to reject her testimony. (Ct. Rec. 30 at
3 9-10.) This argument is not persuasive because the Ninth Circuit
4 Court of Appeals has held that minimal or conservative treatment for
5 allegedly disabling symptoms is a "clear and convincing" reason to
6 support an adverse credibility finding. *Tommasetti*, 533 F.3d at
7 1039; *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007); *Light*,
8 119 F.3d at 792. The ALJ accurately noted that Plaintiff was not
9 prescribed pain medication for her allegedly disabling neck and back
10 pain, and that she reported to her examining physician that she had
11 not seen an orthopedic specialist for her complaints since 1999.
12 (Tr. 17.) The record amply supports this basis for the ALJ's
13 credibility determination. For example, as noted by the ALJ,
14 Plaintiff was receiving medical care from Deana Dahl, ARNP, from May
15 2004 until August 2007. (Tr. 18-19.) Beginning in May 2004,
16 Plaintiff was treated with medication for diabetes (which was noted
17 as "stable") and elevated lipids. (Tr. 193.) Plaintiff complained
18 of low back pain in October 2004, at which time Nurse Dahl
19 recommended "increased activity." (Tr. 248, 251.) In March 2006,
20 Nurse Dahl noted Plaintiff's back and leg pain "with walking." (Tr.
21 254.) In May 2007, Plaintiff's neck and back pain were noted as
22 mild to moderate in clinic notes, and there is no record of
23 prescribed pain medication. (Tr. 260.) At that time, Nurse Dahl
24 specifically recommended stretching and regular exercise to relieve
25 neck and back pain, and ordered x-rays. (Tr. 261.) The ALJ's
26 rationally interpreted the evidence and articulated "clear and
27 convincing" reasons for discounting the severity of Plaintiff's
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1 assertions of disabling pain and fatigue. It is also noted that
 2 the ALJ's credibility findings did not totally reject Plaintiff's
 3 subjective symptoms. As discussed below, the final RFC incorporates
 4 walking and standing limitations with an option to stand and sit at
 5 will to relieve discomfort, as well as limitations caused by her
 6 borderline intellectual functioning. The RFC is consistent with
 7 Plaintiff's medically determinable impairments and credited medical
 8 evidence, as well Plaintiff's own credible testimony.

9 **B. Step Two: Non-Severe Impairments**

10 Plaintiff argues the ALJ erred when he rejected her diagnosed
 11 cervical spine disorder and mental impairments as "frivolous."
 12 (Ct. Rec. 24 at 13.) She argues the ALJ erroneously rejected the
 13 opinions of Nurse Dahl that these impairments caused significant
 14 limitations. She also claims the ALJ improperly rejected the
 15 opinions of agency and examining physicians whose opinions, if
 16 credited, would require a finding of disability. (*Id.* at 14-15.)

17 At step two of the sequential evaluation, the ALJ determines
 18 whether a claimant suffers from a "severe" impairment, *i.e.*, one
 19 that significantly limits her physical or mental ability to do basic
 20 work activities. 20 C.F.R. § 416.920(c). To satisfy step two's
 21 requirement of a severe impairment, the claimant must prove the
 22 existence of a physical or mental impairment by providing medical
 23 evidence consisting of signs, symptoms, and laboratory findings; the
 24 claimant's own statement of symptoms alone will not suffice. 20
 25 C.F.R. § 416.908. The fact that a medically determinable condition
 26 exists does not automatically mean the symptoms are "severe," or
 27 "disabling" as defined by the Social Security regulations. See,
 28

1 e.g., *Edlund*, 253 F.3d at 1159-60; *Fair*, 885 F.2d at 603; *Key v.*
 2 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

3 The Commissioner has passed regulations which guide dismissal
 4 of claims at step two. Those regulations state an impairment may be
 5 found to be not severe when "medical evidence establishes only a
 6 slight abnormality or a combination of slight abnormalities which
 7 would have no more than a minimal effect on an individual's ability
 8 to work." *SSR* 85-28 at 3.¹ "The severity requirement cannot be
 9 satisfied when medical evidence shows that the person has the
 10 ability to perform basic work activities, as required in most jobs."
 11 Basic work activities include: "walking, standing, sitting, lifting,
 12 pushing, pulling, reaching, carrying, or handling; seeing, hearing,
 13 speaking; understanding, carrying out and remembering simple
 14 instructions; responding appropriately to supervision, coworkers,
 15 and usual work situation." *Id.*

16 Further, even where non-severe impairments exist, these
 17 impairments must be considered in combination at step two to
 18 determine if, together, they have more than a minimal effect on a
 19 claimant's ability to perform work activities. 20 C.F.R. § 416.929.
 20 If impairments in combination have a significant effect on a
 21 claimant's ability to do basic work activities, they must be
 22 considered throughout the sequential evaluation process. *Id.*

23 As explained in the Commissioner's policy ruling, "medical
 24 evidence alone is evaluated in order to assess the effects of the

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 26 ¹ The Supreme Court upheld the validity of the Commissioner's
 27 severity regulation, as clarified in *SSR* 85-28, in *Bowen v. Yuckert*,
 28 482 U.S. 137, 153-154 (1987).

1 impairments on ability to do basic work activities." *Id.* Thus, in
2 determining whether a claimant has a severe impairment, the ALJ
3 evaluates the medical evidence submitted and must explain the weight
4 given to the opinions of accepted medical sources in the record.
5 The agency regulations distinguish among the opinions of three types
6 of accepted medical sources: (1) sources who have treated the
7 claimant; (2) sources who have examined the claimant; and (3)
8 sources who have neither examined nor treated the claimant, but
9 express their opinion based upon a review of the claimant's medical
10 records. 20 C.F.R. § 416.927. A treating physician's opinion
11 carries more weight than an examining physician's, and an examining
12 physician's opinion carries more weight than a non-examining
13 reviewing or consulting physician's opinion. *Benecke v. Barnhart*,
14 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821,
15 830 (9th Cir. 1995), "As is the case with the opinion of a treating
16 physician, the Commissioner must provide 'clear and convincing'
17 reasons for rejecting the uncontradicted opinion of an examining
18 physician." *Lester*, 81 F.3d at 830 (citation omitted). If the
19 opinion is contradicted, it can only be rejected for "specific" and
20 "legitimate" reasons that are supported by substantial evidence in
21 the record. *Andrews*, 53 F.3d at 1043.

22 Historically, the courts have recognized conflicting medical
23 evidence, the absence of regular medical treatment during the
24 alleged period of disability, and the lack of medical support for
25 doctors' reports based substantially on a claimant's subjective
26 complaints of pain as specific, legitimate reasons for disregarding
27 a treating or examining physician's opinion. *Flaten v. Secretary of*
28 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*,

1 885 F.2d at 604.

2 1. Cervical Spine DDD

3 At step two, the ALJ found the medical evidence did not support
4 a finding that Plaintiff's cervical spine condition caused
5 significant work-related functional limitations. (Tr. 15.)
6 Plaintiff argues this was error because the ALJ cited only to
7 medical evidence showing a mild impairment and did not give adequate
8 reasons for rejecting examining medical doctor Joseph Diehl's
9 opinion that Plaintiff would have "difficulty with work activities
10 that required repetitive motion at the cervical spine." (Ct. Rec.
11 24 at 14; Tr. 165.)

12 The record shows that Dr. Diehl stated he based this opinion on
13 Plaintiff's subjective complaints, as well as objective findings of
14 tenderness in the cervical area. (*Id.*) Further, he stated, "the
15 permanent nature of any disability in this case is seriously in
16 question." (Tr. 167.) He observed Plaintiff was receiving no
17 medical care at the time of the exam. He concluded the use of anti-
18 inflammatory medication "would improve her condition considerably."
19 (*Id.*)

20 In his step two findings, the ALJ referenced objective imaging
21 that showed only mild degeneration of the cervical spine and no
22 evidence of "significant work-related functional limitations." (Tr.
23 15.) In his summary of the evidence, the ALJ specifically
24 referenced Dr. Diehl's opinion that Plaintiff would have difficulty
25 with activities involving repetitive motions of the cervical spine.
26 (Tr. 18.) The ALJ rejected this particular limitation as
27 unsupported by (1) the objective imaging reports showing only mild
28 changes, and (2) opinions of other examining medical doctors. He

1 also found there was no other supporting evidence in the record that
2 Plaintiff's ability to do work-related activities was significantly
3 limited by cervical spine problems. (Tr. 18.) These are specific,
4 legitimate reasons for rejecting a contradicted medical opinion.
5 *Thomas*, 278 F.3d at 957; see also *Fair*, 885 F.2d at 605. Further,
6 the record in its entirety supports the ALJ's rejection of this
7 distinct limitation. For example, in later discussion of the
8 medical evidence, the ALJ noted Dr. Diehl's opinion that Plaintiff's
9 limitations would improve with medication. (*Id.*) He also
10 referenced Dr. Jamie King's evaluation in which the examining
11 physician opined Plaintiff could stand and walk for four hours, and
12 sit for six hours in an eight-hour day with breaks. (Tr. 18, 201-
13 03.) Dr. King specifically stated that other than postural
14 limitations on bending, stooping and crouching, there were no other
15 relevant limitations. (Tr. 203.)

16 Even if there were evidence of more than a minimal effect on
17 Plaintiff's ability to do work activities, the ALJ considered the
18 effects of Plaintiff's spinal disorders (severe and non-severe)
19 throughout the five-step sequential evaluation. The final RFC
20 determination specifically incorporated an at-will sit/stand option
21 to relieve discomfort from exertion or postures that would be
22 limited by her cervical spine condition. At step five, the four-
23 hour limit on standing and walking and the stand/sit at will
24 requirements were propounded to the VE, who then opined the
25 hypothetical individual could perform several other jobs in the
26 national economy. (Tr. 317-18.) Because the ALJ continued the
27 sequential evaluation considering severe and non-severe impairments,
28 Plaintiff was not prejudiced and the alleged error at step two would

1 be deemed harmless. *Lewis v. Astrue*, 498 F.3d 909, 910 (9th Cir.
 2 2007); *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050,
 3 1056 (9th Cir. 2006).

4 2. Anxiety Disorder versus PTSD

5 Citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) and
 6 *SSR 96-2*, Plaintiff appears to argue the ALJ did not properly reject
 7 the marked mental limitations assessed by Deana Dahl, Plaintiff's
 8 treating nurse practitioner. (Ct. Rec. 24 at 16.) However,
 9 Plaintiff argues standards that apply to an "acceptable medical
 10 source." (*Id.* at 17.) The *Embrey* court, as cited by Plaintiff,
 11 found uncontradicted conclusions of treating physicians cannot be
 12 disregarded unless "clear and convincing" reasons are set forth in
 13 detail. *Embrey*, 849 F.2d at 421-22. Here, Ms. Dahl is not a
 14 treating physician or an "acceptable medical source" for purposes of
 15 these proceedings. Under the Regulations, a nurse practitioner is
 16 considered an "other source." 20 C.F.R. § 416.913(d). "Other
 17 source" opinions can never establish a diagnosis or disability
 18 absent corroborating competent medical evidence. *Nguyen v. Chater*,
 19 100 F.3d 1462, 1467 (9th Cir. 1996). The opinion of an acceptable
 20 medical source is given more weight than that of an "other source."
 21 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-
 22 71. (9th Cir. 1996). However, the ALJ is required to "consider
 23 observations by non-medical sources as to how an impairment affects
 24 a claimant's ability to work." *Sprague*, 812 F.2d at 1232. As ruled
 25 in *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993), an ALJ is
 26 obligated to give reasons "germane" to "other source" testimony
 27 before discounting it.

28 Here, the ALJ gave Ms. Dahl's August 20, 2007, medical report

1 and mental RFC assessment little weight. (Tr. 19, 282-91.)
 2 Although Plaintiff asserts the ALJ's reasoning was vague, the ALJ
 3 articulated specific reasons for discounting the severe limitations
 4 assessed by Ms. Dahl: (1) her findings were inconsistent with her
 5 treatment record; (2) she did not prescribe pain medication; (3) she
 6 did not require treatment for pain complaints or mental health
 7 issues; and (4) there was no evidence of objective intellectual
 8 functioning testing. (Tr. 19.) The ALJ's reasoning is supported by
 9 the record, including notes in April 2004, by Ms. Dahl that
 10 Plaintiff reported her anxiety was "not severe," and she no longer
 11 needed prescribed anxiety medication. (Tr. 192.) Other treatment
 12 notes from Ms. Dahl's clinic do not reflect complaints or
 13 recommended treatment for anxiety or PTSD. (Tr. 193, 248-63.)

14 For example, in clinic notes dated August 10, 2007, (ten days
 15 before Ms. Dahl completed her medical report and RFC), a physician
 16 at Ms. Dahl's clinic indicated "no unusual anxiety or evidence of
 17 depression." (Tr. 263.) The ALJ did not err in his rejection of
 18 Ms. Dahl's opinion evidence.

19 Citing *Regennitter v. Commissioner of Social Sec. Admin.*, 166
 20 F.3d. 1294 (9th Cir. 1999), Plaintiff also argues the ALJ erred when
 21 he "rejected [her] mental health impairments because of a lack of
 22 treatment." (Ct. Rec. 24 at 16, 18.) Plaintiff's reliance on this
 23 case is misplaced. First, the ALJ did not reject Plaintiff's mental
 24 impairments; he found her diagnosed "anxiety disorder versus
 25 posttraumatic stress disorder" was not a severe impairment at step
 26 two, but he clearly stated that this non-severe impairment "will be
 27 considered in assessing the claimant's residual functional
 28 capacity." (Tr. 15.) Second, in *Regennitter*, the ALJ cited lack of

treatment as a reason to reject the claimant's credibility, not a medical opinion. *Regennitter*, 166 F.3d at 1296. Indeed, the reviewing court in *Regennitter* held the rejection of a claimant's complaints for lack of treatment due to his inability to pay is not a "clear and convincing" reason to support a credibility finding. *Id.* at 1297. Further, the Ninth Circuit has held that the credibility of a claimant with mental impairments cannot be impugned because he or she fails to seek treatment. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996). Here, the ALJ neither rejected Plaintiff's claim of mental health impairment nor chastised her for lack of mental health treatment. He reasoned Nurse Dahl's failure to recommend mental health treatment or prescribed medication was inconsistent with her findings that Plaintiff was markedly limited by psychological impairments. This reasoning is not legal error and is sufficient to reject an other source opinion.

In his evaluation of mental impairments, the ALJ gave weight to opinions from examining psychologist Jamie Carter, Ph.D., and agency reviewing psychologist Janis Lewis, Ph.D., both of whom are accepted medical sources. (Tr. 19, 206-09, 218-33.) Dr. Carter diagnosed anxiety disorder and borderline intellectual function based on results of objective testing. (Tr. 209.) The ALJ summarized Dr. Carter's report, noting the reported deficits would slow Plaintiff's pace, her ability to follow directions, and her ability to learn new complex tasks. He then pointed out that Plaintiff had worked in the past with the identified mental impairments, and that there was no evidence in the record that she was incapable performing the level of work described in the final RFC, i.e., simple repetitive tasks with no public contract. (Tr. 18, 19.) The state agency

1 psychologist, Dr. Lewis, reviewed Dr. Carter's evaluation and
2 assessed Plaintiff's functional capacity in a narrative summary, as
3 well as a check box form. (Tr. 218-34.) Dr. Lewis found Plaintiff
4 was "capable of simple repetitive tasks and would work best with
5 only minimal contact." (Tr. 220.)

6 Plaintiff argues the ALJ failed to explain the weight given Dr.
7 Carter's opinions and ignored Dr. Lewis' numerous moderate
8 limitations marked on the check box form. (Ct. Rec. 24 at 19.)
9 However, Plaintiff does not identify what portions of Dr. Carter's
10 report were erroneously rejected, or what limitations caused by
11 anxiety vs. PTSD are supported by the record and should have been
12 included. A review of the record in its entirety indicates the ALJ
13 did not err in his evaluation of the psychologists' evidence or his
14 step two finding that Plaintiff's anxiety vs. PTSD was not severe.

15 A mental impairment generally is considered not severe if the
16 degree of limitation in the three functional areas of activities of
17 daily living, social functioning, and concentration, persistence or
18 pace is rated as "none" or "mild" and there have been no episodes of
19 decompensation. 20 C.F.R. § 416.920a(d)(1). Plaintiff appears to
20 argue that her anxiety symptoms caused more than minimal limitations
21 in her ability to work. However, she does not identify specific
22 symptoms or how they would limit her. For example, Dr. Carter noted
23 anxiety disturbed sleep "might affect her ability to maintain a work
24 schedule." (Tr. 209.) This speculative opinion alone does not
25 establish severity.

26 Dr. Carter also noted Plaintiff could perform her activities of
27 daily living: she did most of her household chores; was able to read
28 and follow recipes; did grocery shopping and laundry. She needed

reminders regarding personal hygiene, but remembered to take her medicine. (Tr. 207-208.) It appears these limitations are related to her borderline intellectual functioning impairment, which the ALJ found severe. In the area of social functioning, Dr. Carter noted Plaintiff interacted primarily with her family and husband, going out to eat and attend church. Regarding her concentration, persistence and pace, Plaintiff was able to do computer work, arts and crafts for about an hour at a time, and read for a couple of hours at a time. She had some problems getting words mixed up, and finishing her daily activities in a timely manner. Dr. Carter suggested Plaintiff's deficits in personal hygiene could affect employability. (Tr. 208-09.) Plaintiff does not argue these deficits are caused by anxiety or PTSD.

The ALJ rationally interpreted Dr. Carter's report as substantial evidence that the diagnosed anxiety disorder vs. PTSD did not cause "more than minimal limitation" in Plaintiff's ability to work. 20 C.F.R. §§ 416.920; 416.920a, 416.920a(d)(1).

Reviewing psychologist Dr. Lewis based her mental RFC assessment on Dr. Carter's evaluation. (Tr. 220.) The check box form indicates several moderate limitations; however Dr. Lewis' narrative interpretation summarizes assessed functional limitations in detail and concludes that Plaintiff was capable of simple repetitive tasks and would work best with limited public contact. (Tr. 220.) Because the ALJ did not disagree with Dr. Lewis's narrative description of Plaintiff's mental RFC (which is supported by the examining psychologist's evidence), he was not required to reject those opinions. Further, he is not required to accept the conclusory findings in the check box form. *Crane v. Shalala*, 76

1 F.3d 251, 254 (9th Cir. 1996); see also SSR 96-8p and SSR 96-5p. See
 2 also *Lester*, 81 F.3d at 831 (citing *Pitzer v. Sullivan*, 908 F.2d
 3 502, 506 n.4 (9th Cir. 1990) (non-examining physician opinion, without
 4 more, is not substantial evidence)).

5 Because neither acceptable medical source identified more
 6 symptoms caused by anxiety or PTSD, the ALJ did not err at step two.
 7 Further, assuming this impairment were severe, Plaintiff was not
 8 prejudiced by this omission because the identified limitation caused
 9 by anxiety was considered throughout the sequential evaluation and
 10 included in the hypothetical at step five. Therefore, the claimed
 11 error would be harmless. *Lewis*, 498 F.3d at 910; *Stout*, 454 F.3d at
 12 1056.

13 C. Step Five

14 Plaintiff argues the ALJ erroneously relied on vocational
 15 expert testimony based on a deficient hypothetical question. (Ct.
 16 Rec. 24 at 20.) The ALJ may rely on vocational expert testimony if
 17 the hypothetical presented to the expert includes all functional
 18 limitations supported by the record and found credible by the ALJ.
Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005). In his
 19 first hypothetical, the ALJ included all exertional limitations
 20 supported by the medical record and Plaintiff's credible testimony.
 21 Plaintiff argues the ALJ should have included limitations assessed
 22 by Nurse Dahl, which the VE opined would preclude sustained
 23 employment. (Ct Rec. 24 at 20.) She also contends the ALJ failed
 24 to include unrejected limitations assessed by agency psychologists.
 25 However, as discussed above, the ALJ specifically rejected Nurse
 26 Dahl's opinions with germane and specific reasons, and properly
 27 evaluated the opinions from acceptable medical sources.
 28

1 Because the ALJ was not required to include properly rejected
2 limitations, the hypothetical relied upon by the VE reflects
3 limitations supported by the record and credible testimony. In
4 addition, limitations due to obesity were incorporated into the
5 hypothetical which described an individual limited to lifting or
6 carrying 10 pounds frequently, 25 pounds occasionally, and who could
7 walk and stand only four hours in an eight-hour day and needed a
8 sit/stand-at-will option. (Tr. 317.)

9 Obesity must be considered in a claimant's RFC because it can
10 cause postural limitations of function. SSR 02-01p. An assessment
11 should be made of the effect obesity has upon the individual's
12 ability to perform routine movement and necessary physical activity
13 within the work environment. Here, the medical evidence upon which
14 the ALJ based his hypothetical and RFC determination identified
15 Plaintiff's morbid obesity, which the evaluators incorporated into
16 in their functional assessments. For example, Dr. Diehl
17 specifically stated that in addition to degenerative joint disease,
18 Plaintiff's obesity "complicates her orthopedic status
19 considerably." He also stated his final functional capacity
20 assessment was based in part on the "objective findings of obvious
21 morbid obesity." (Tr. 166.) Nonetheless, he concluded Plaintiff
22 could do work activities requiring standing or walking for five to
23 six hours of an eight-hour day with breaks every half hour to hour.
24 (*Id.*)

25 Likewise, Dr. King noted Plaintiff's ability to climb on the
26 examining table was difficult "due to her obese body habitus." (Tr.
27
28

1 201.) She also noted Plaintiff did not require an assistive device.²
 2 (*Id.*) The record shows that on exam, Plaintiff exhibited normal
 3 muscle bulk, tone and 5/5 strength in grip and upper extremities.
 4 (*Id.*) Pain in lower extremities was relieved by shifting position.
 5 (Tr. 203.) Dr. King concluded Plaintiff could do work activities as
 6 long as she had breaks and could shift her weight. (Tr. 203.) As
 7 discussed above, the ALJ incorporated these requirements in his RFC
 8 and hypothetical to address the impact of Plaintiff's obesity on
 9 otherwise mild to moderate joint disease.

10 The final determination regarding Plaintiff's ability to
 11 perform basic work is the sole responsibility of the Commissioner,
 12 and no special significance is given to a medical source, or other
 13 source, opinion on issues reserved to the Commissioner. 20 C.F.R.
 14 § 416.927(e), .946; SSR 96-5p. The ALJ's hypothetical was not
 15 deficient; therefore, the VE testimony is substantial evidence that
 16 supports the ALJ's step five findings. Where, as here, the ALJ's
 17 findings are based on a rational interpretation of substantial
 18 evidence, the Commissioner's determination can not be disturbed.
 19 Accordingly,

20 **IT IS ORDERED:**

21 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 23**) is
 22 **DENIED;**

24 ² There is no medical evidence Plaintiff has difficulty
 25 ambulating and must depend on a walker, canes, or crutches, which is
 26 a requirement to meet or equal the Listing for musculoskeletal
 27 impairment. See 20 C.F.R. § 404, Subp. P, App. 1, at 1.00(B)(1),
 28 (2)(b)(2).

2. Defendant's Motion for Summary Judgment (Ct. Rec. 28) is

GRANTED;

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. The file shall be closed and judgment entered for Defendant.

DATED July 27, 2009.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE